(1)

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

DAVID HENSON MCNAB,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in concluding, in direct conflict with decisions of at least five circuits, that a federal court may refuse to accord deference to a foreign sovereign's official interpretation of its own laws, in cases where such foreign laws provide a rule of decision that the federal court must apply.

2. Whether, on direct review before a criminal conviction becomes final, a federal court may refuse to give effect to the clarification, invalidation, or repeal of a law included within the offense of conviction.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the following individuals were defendants-appellants in the consolidated appeals below and are respondents in this Court: Robert D. Blandford, Abner J. Schoenwetter, and Diane H. Huang.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner David Henson McNab respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-43a), as amended on grant of partial rehearing, is reported at 331 F.3d 1228 (11th Cir. 2003). The orders of the United States District Court for the Southern District of Alabama regarding foreign law (Pet. App. 44a-76a) are unreported.

JURISDICTION

The district court had jurisdiction over the case against Mr. McNab pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction to review the final judgment of the district court pursuant to 28 U.S.C. § 1291. The judgment of the court of appeals was entered on March 21, 2003. The court of appeals granted rehearing in part and denied Mr. McNab's suggestion for rehearing en banc on May 29, 2003. Pet. App. 78a. On August 8, 2003, Justice Kennedy extended the time to file a petition for a writ of certiorari to and including September 26, 2003. *See* Application No. 03A108. On September 20, 2003, Justice Kennedy further extended the time to file the petition to and including October 24, 2003. *Id.* The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment, U.S. CONST. amend. V; the pertinent provisions of the Lacey Act, 16 U.S.C. §§ 3371 *et seq.*, and the statutes of conviction; and the relevant provisions of Honduran constitutional, statutory, and administrative law are set forth in the Appendix at 92a-113a and 328a-418a.

STATEMENT OF THE CASE

Petitioner David Henson McNab, a Honduran lobster fisherman, was convicted under federal statutes that require, as an essential predicate, proof that Mr. McNab imported fish or wildlife into the United States in violation of "any foreign law." The prosecution's theory was that Mr. McNab violated the laws of Honduras, because all of his lobsters were packed in plastic (rather than cardboard boxes) and because some of his lobsters had tails that were too short or showed signs of having borne eggs. The Republic of Honduras, through its embassy, appeared before the court of appeals and demonstrated, through the opinions of officials who are authorized to issue binding interpretations of Honduran law and given the exclusive power to represent Honduras, that Mr. McNab's conduct did ***not*** violate any laws of Honduras.

A divided panel of the Eleventh Circuit nonetheless affirmed the convictions, and a draconian eight year sentence, because (contrary to the approach followed by numerous other circuits with respect to issues of foreign law) it declined to defer to the official views of the Republic of Honduras. The majority cited considerations of "finality," reasoning that Honduras's official position is at odds with the testimony of lower-ranking Honduran employees on whom the prosecution relied—witnesses who, according to the Honduran government's official position, were unauthorized, incompetent and wrong. And the majority also justified its refusal to defer to the official interpretation that Honduras gives to its own laws because it believed (contrary to other circuits, which presume the regularity of the official actions of foreign governments) that foreign governments may be corruptly influenced to manipulate their own laws to the detriment of U.S. prosecutions. These conclusions, which clearly depart from this Court's cases and from how other circuits determine recurring issues of foreign law, warrant this Court's review.

1. David Henson McNab is a Honduran citizen whose family has been engaged in the fishing business for genera-

tions. Some of the lobsters caught by his company's vessels in the Caribbean are imported into the United States.

In early March 1999, agents of the National Marine Fisheries Service (NMFS) seized a shipment by Mr. McNab's company in Bayou La Batre, Alabama, following the receipt of an anonymous fax a month earlier. *See* Pet. App. 4a-5a. The fax had alleged that the shipment would contain "undersized" lobsters and lobsters packed "in bulk"; it also had stated that "Honduran law . . . requires that all product[s] exported from our country should be packed in boxes." *Id.* at 252a. The agents determined that the lobsters in the shipment were wrapped in plastic bags. *Id.* at 5a. A small proportion of the shipment (about 7 percent) were or had been egg-bearing; an even smaller percentage of the lobster tails (about 3 percent) measured under 5.5 inches. *See id.* at 183a-84a.

Following receipt of the anonymous fax, NMFS agents contacted various officials of the Honduran fisheries service (DIGEPESCA), a part of the Honduran Ministry of Agriculture and Livestock, by telephone and by letter to seek help in their investigation. After the seizure, a NMFS agent also traveled to Honduras with a U.S. government attorney and met with several officials and employees of the Ministry of Agriculture and Livestock, including the Minister. Pet. App. 5a. In the ensuing months, various officials of the Ministry provided to U.S. authorities copies of Honduran statutes and regulations, historical information about fishing practices in the Caribbean islands that lie off the coast of Honduras, and other information requested by U.S. authorities. *Id.* at 4a-6a.

In May 2000, the U.S. government indicted Mr. McNab and three American co-defendants who regularly purchased and distributed shipments of lobster from Mr. McNab's company. The basis for the prosecution was the Lacey Act, 16 U.S.C. §§ 3371 *et seq.*, which bars the importation of "any fish or wildlife taken, possessed, transported, or sold in viola-

tion of any law or regulation of any State or in violation of any foreign law." *Id.* § 3372(a)(2)(A).[1]

All of the charges against Mr. McNab were predicated solely on alleged violations of Honduran laws and regulations relating to lobster fishing and packing. The evidence presented focused on Mr. McNab's alleged violation of three Honduran laws or regulations: (1) a regulation requiring that lobsters be individually packed in cardboard boxes; (2) a regulation governing the permissible size of kept lobsters; and (3) a statute that, according to the prosecution, prohibited the harvesting or destruction of egg-bearing lobsters. Pet. App. 18a-19a.[2]

The packaging regulation, Acuerdo ("Agreement") No. 0008-93, was promulgated in 1993 pursuant to a 1973 meat-

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[1] Mr. McNab was not charged with a Lacey Act violation, but the Act underlay all of the charges against him: a charge of money laundering accused him of depositing proceeds from the commission of the crime of "importation contrary to law," *see* 18 U.S.C. § 545, and the "importation contrary to law" charge in turn accused him of transporting lobsters "contrary to" the Lacey Act. *See* Pet. App. 2a-3a & n.1. Related conspiracy counts likewise were predicated on Lacey Act violations. *Id.* at 118a-19a. Mr. McNab's co-defendants (but not Mr. McNab) were accused of violating (and conspiring to violate) Florida law as well. *Id.* at 224a, 245a.

[2] The prosecution also proffered other supposed violations of Honduran norms, including "closed season" rules, shrimping regulations, and statutory provisions requiring that lobster boats land their catch in Honduras and file "catch reports" with the Honduran authorities. The district court directed a verdict of acquittal for Mr. McNab on the closed season and shrimping rules; the government never charged violation of the landing requirement in the indictment; and Mr. McNab showed at trial that he did in fact file the required catch reports. Pet. App. 205a-06a, 215a; *see id.* at 138a-39a, 202a-04a.

inspection statute. Acuerdo No. 0008-93 listed a number of detailed prescriptions for the icing and packaging of Honduran-caught lobster, including the requirement that, before export, lobsters be packaged in boxes. Pet. App. 354a. The size regulation, Resolution No. 030-95, was issued in 1995 under the sole authority of the Minister of Agriculture and the head of DIGEPESCA; it purported to prescribe 5.5 inches as the minimum abdominal length for kept lobsters. *See id.* at 403a. The remaining statute, Article 70 of the Fishing Law of 1959, provided penalties for "[t]hose who destroy or harvest the eggs, or the offspring of fish, chelonians or other aquatic species for profit." *Id.* at 395a. The prosecution contended that this statute barred the harvesting of egg-bearing aquatic species, not merely the eggs themselves.

2. In September 2000, before the trial, the district court convened a foreign law hearing to determine the validity and scope of the Honduran laws on which the charges against Mr. McNab rested.[3] Mr. McNab presented testimony by Honduran-law experts, including a former Honduran Minister of Justice. These witnesses explained, *inter alia*, that the egg-harvesting statute did not forbid the harvesting of lobsters or other marine wildlife that happened to be bearing eggs when caught (as opposed to harvesting the eggs themselves, as in the case, for example, of turtles). Pet. App. 58a. They also testified that the size restriction set forth in Resolution No. 030-95 was void because, under Honduran law, generally applicable rules (such as the size restriction) may be validly promulgated only if they are signed by the President when issued. *Id.* at 53a, 176a-80a, 186a-95a. It was undisputed that Resolution No. 030-95 was not so signed; it had been

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[3] As reflected in the order issued by the district court following the foreign-law hearing, the hearing considered a number of additional prosecution claims under Honduran law that the prosecution ultimately abandoned before the case went to the jury. *E.g.*, Pet. App. 59a; *see supra* note 2.

promulgated under the sole authority of the Minister of Agriculture and the head of DIGEPESCA. *Id.* at 403a. Indeed, Mr. McNab also submitted a legal opinion by the incumbent Attorney General of Honduras—Hector Ramon Tróchez—who confirmed that the President's failure to sign the size restriction resulted in the "invalidity of these regulations." *Id.* at 254a-56a; *see id.* at 192a-94a.

The prosecution's only Honduran-law witness was Liliana Paz, a midlevel official of the Honduran Ministry of Agriculture and Livestock. As "Secretary-General" of that ministry, her functions were to act as its "instrument of communication" and to perform certification duties. Her duties did not include legal interpretation. Pet. App. 160a, 262a-63a. Ms. Paz testified that all of the regulations and statutes on which the prosecution relied were valid and applicable to Mr. McNab's conduct. *Id.* at 161a-71a.

Based on Ms. Paz's testimony, which it termed "critical" to its analysis, the district court held that the three Honduran laws and regulations were valid and that the prosecution could present evidence of their violation at trial. Pet. App. 56a. In particular, the court found itself in a "dilemma" over the size regulation's validity, but relied on Ms. Paz for the proposition that "the Honduran government view[ed] the [size restriction] to be valid." *Id.*

3. The case proceeded to trial based on Honduran law and regulations and, in the case of the defendants other than Mr. McNab, on the basis of Florida laws as well. Pet. App. 224a. Mr. McNab was convicted in November 2000. In August 2001, the district court sentenced Mr. McNab under the Guidelines to 97 months in prison—more than eight years. Pet. App. 82a.[4] Mr. McNab had remained free on bond until

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[4] Mr. McNab's sentence was calculated based on the value of entire shipments of lobster; because they were packed in plastic rather than in cardboard boxes, the entire shipments were deemed to violate the Honduran packaging regulation and hence the Lacey

then, traveling back and forth to Honduras but appearing at each and every hearing as required, and the district court agreed to continue bond pending appeal. *Id.* The government appealed and, one day later, the Eleventh Circuit ordered Mr. McNab confined. He remains incarcerated.

4. After the foreign-law hearing, Mr. McNab brought an action in the Honduran administrative-law courts seeking a declaration that the size regulation, Resolution No. 030-95, was invalid, because it was not signed by the President when issued. The prosecution had earlier suggested that Mr. McNab's failure to seek such relief in Honduras confirmed the regulation's validity. *See* Pet. App. 7a & n.9, 170a, 180a. In May 2001—several months after Mr. McNab's trial had ended—the Honduran Court of First Instance of Administrative Law ruled that the size restriction did indeed "violate[] the legal code at the time [it was] issued." *Id.* at 298a.[5]

Mr. McNab's attorneys also discovered after trial that the 1973 statute under which the packaging restrictions were promulgated had in fact been repealed in 1995. They obtained expert testimony—from a Honduran administrative law professor; from the former President of Honduras who

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Act, and the shipments' full value was deemed the "proceeds" of money laundering. *See* Presentence Investigation Report 19, 23.

[5] Under the Honduran Administrative Code, the court could entertain the challenge to the regulation only if it was "null and void as a matter of law" but was still "producing effects," in which case the court could, under Article 32 of said Code, declare it "null and void and inapplicable in the future." Pet. App. 297a, 420a. The administrative-law court's decision did precisely that, stating (in the words of Article 32) that Resolution No. 030-95 was "entirely voided, but this is only for purposes of their annulment and future inapplicability: This Resolution does not confer any right to claims," *i.e.*, monetary claims against the government for enforcing the law before it was declared invalid. *Id.* at 298a.

had signed the packaging regulation; and from other attorneys—that in the Honduran legal system, "regulations are automatically repealed when the law under which they were issued is repealed." Pet. App. 71a & n.9. Indeed, they even obtained an affidavit from Ms. Paz to the same effect.

Because these developments revealed that neither the size restriction nor the packaging regulation was valid during the time period charged in the indictment, Mr. McNab moved for a new trial. He also presented to the district court a more recent Honduran statute repealing the egg-harvesting statute—which, under the Honduran Constitution, operated retroactively. *See* Pet. App. 406a, 415a. The prosecution opposed the motion, relying once again on the purported expertise of Ms. Paz, who submitted a supplemental affidavit that recanted her recent affidavit agreeing with Mr. McNab on the effect of the 1995 repeal and opined that all relevant laws and regulations remained valid and binding. *See id.* at 72a, 76a.

The district court denied the motion in August 2001, a few weeks after Mr. McNab was sentenced. The court first reasoned that it need not give effect to the Honduran court's invalidation of the size restriction because the Honduran government was appealing the ruling and "continu[ing] to enforce" the regulation pending the appeal, and because, although the district judge admittedly found the "legal meaning" of the Honduran court's opinion "not entirely clear," he thought that the ruling voided the size restriction only prospectively. *Id.* at 70a. The court concluded that the packaging restriction remained in effect despite the 1995 repeal of the authorizing statute, because a replacement statute could validate it and, again, because the government continued to enforce it. *Id.* at 71a-73a. Finally, although given "pause" by the deletion of the egg-harvesting provision from the Honduran statute books, which it found "troubling," the court concluded (based on Ms. Paz's assertion) that the restriction nonetheless retained vitality under Honduran law. *Id.* at 75a-76a.

In October 2001, two months after the district court rejected Mr. McNab's motion, the Honduran Court of Appeals of Administrative Law unanimously affirmed the lower-court decision invalidating the size regulation. Pet. App. 302a-04a. The Honduran government filed no further appeal.

5. Mr. McNab also challenged Ms. Paz's conduct in testifying for the prosecution and the substance of her testimony by bringing the equivalent of a civil rights complaint before the Honduran National Human Rights Commissioner. The Commissioner is authorized by Honduran law to examine whether allegedly arbitrary or unlawful conduct by Honduran government officials constitutes "legal error," "abuse of power," or "negligence." Pet. App. 309a. In early November 2001, the Commissioner issued a written report concluding that Ms. Paz's testimony had been legally wrong in numerous respects. *Id.* at 306a-13a. The report recommended that her superior—the Minister of Agriculture—"[d]isqualify as an error of law" her previous actions in Mr. McNab's case. *Id.* at 312-13a.[6] As required by Honduran law, the report was delivered to the Minister, who was obliged to respond in

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[6] The Commissioner, Dr. Leo Valladares, is internationally recognized as a distinguished constitutional lawyer, law professor, and human rights advocate. His reputation for independence and diligence has been recognized by the U.S. Congress and other legislative bodies and led his peers in the human rights community to elect him both President of the OAS's Inter-American Commission on Human Rights and President of the Ibero-American Federation of Ombudsmen. *See, e.g.*, S. Res. 72, 14th Leg. Assem., 1st Reg. Sess. (P.R. 2001); Testimony of Dr. Leo Valladares Lanza on the Human Rights Information Act (May 11, 2003) (LEXIS, News Library, Fednew File); Douglass W. Cassel Jr., *An Institution That Deserves U.S. Support*, CHI. DAILY L. BULL., Oct. 17, 1995, at 5 (listing Dr. Valladares's successes as ombudsman and citing him as an example of "truth-telling . . . by respected public figures in positions of official authority").

writing whether he would accept the Commissioner's conclusions. *Id.* at 316a.

On November 15, 2001, the Minister accepted the Commissioner's report in its entirety and certified as "the official position" of the Ministry that the size restriction had "***never had the force of law***"; that the egg-harvesting restriction had been retroactively repealed; and that the packaging rules had been invalidated when the authorizing statute was repealed. Pet. App. 315a-18a (emphasis in original). For the latter point, the Minister also relied on an "interpretive decree" that had been issued by the Honduran Congress in early November 2001. *Id.* at 317a. The Congress, which in Honduras's civil law system is the final interpretive legal authority, declared that the express repeal of a law automatically leaves without any legal effect the regulations promulgated to implement the repealed law, absent contrary provision in the repealing statute. *Id.* at 408a-09a. This decree squarely contradicted Ms. Paz's testimony, and it confirmed Mr. McNab's position that the repeal of the meat-inspection statute had also repealed the packaging regulations under which he was prosecuted.

Ms. Paz acquiesced in and countersigned the Minister of Agriculture's order "disqualify[ing] as an error of law" the views she had expressed as a prosecution witness. Pet. App. 316a, 318a. The Minister then directed all Ministry employees to abide by the legal conclusions set forth in the Minister's order. *Id.* at 322a-24a.

By diplomatic note dated January 23, 2002, the Honduran Embassy in the United States transmitted to the U.S. Department of State the documents reflecting the Minister's official actions, noting that their effect was to "find[] that the laws of Honduras were not violated by Mr. McNab" and "request[ing] that [they] be submitted as soon as possible to the Department of Justice for its consideration." Pet. App. 326a.

6. Mr. McNab appealed his conviction.[7] Through its Embassy in the United States, the Republic of Honduras participated as *amicus curiae* on Mr. McNab's behalf, submitting to the court a detailed opinion by the new Attorney General of Honduras, Sergio Zavala Leiva. The Attorney General—the sole "Legal Representative" of Honduras under that country's constitution—explained that Mr. McNab had violated no valid Honduran law. Pet. App. 257a-71a, 417a. With the benefit of the post-trial developments, the Attorney General concluded, among other things, that the size regulation was void *ab initio*, because it was never validly promulgated; that the lobster-egg statute had *never* covered the harvesting of egg-bearing lobsters; and that the packing regulations necessarily became void in 1995, when the underlying statute was repealed. *Id.* at 265a-71a. He also noted that Ms. Paz lacked any legal authority or competence to opine on the meaning of Honduran law on behalf of Honduras, and that her conduct in testifying was a violation of Honduran law and of Honduran due process. *See id.* at 262a-64a.

a. Nevertheless, a divided panel of the Eleventh Circuit affirmed, concluding that *all three* regulations were valid during the time period covered by the indictment. Pet. App. 34a.[8] To reach this conclusion, the panel was obliged to reject Mr. McNab's contention that the court should defer to

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[7] During the initial appellate briefing, the defendants returned to the district court with requests for judicial notice and for a new trial, raising post-trial developments described above. These motions were denied and the defendants filed new appeals, which were consolidated with the original appeals. Pet. App. 9a n.12.

[8] The court of appeals recognized at the outset of its discussion of the foreign-law issues that, because the jury returned a general verdict, "if *any* of the three Honduran laws that the defendants challenge were invalid during the time period covered by the indictment, the defendants' convictions must be reversed." Pet. App. 19a & n.22 (emphasis added).

the Honduran government's official interpretation of its own laws. *Id.* at 20a-24a. The majority gave two reasons for its conclusion.

First, the majority stated that it could not agree "that the Honduran Embassy's position is determinative" because the Executive Branch of the United States—*i.e.*, the officials charged with *prosecuting* Mr. McNab—had "taken the position that the various Honduran laws in issue are valid" and thus "had declined to accept the position of the Honduran Embassy." The court thought that the "political question" doctrine prevented it from disagreeing. Pet. App. 90a n.24.

Second, the majority asserted that the Honduran government had "changed" its position during the litigation, and reasoned that "finality" and the possibility that foreign governments will be corruptly influenced to undermine U.S. prosecutions left the court "free to follow" the "original" position presented by Ms. Paz. Pet. App. 20a-24a & n.25.[9] Emphasizing that the district court and the government had "rel[ied] upon [the] representations" of Ms. Paz and of Honduran enforcement agents, and having decided that no defer-

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[9] The court explained:

> There must be some finality with representations of foreign law by foreign governments. Given the inevitable political changes that take place in foreign governments, if courts were required to maintain compliance with a foreign government's position, we would be caught up in the endless task of redetermining foreign law.
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> . . .
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> . . . *Although such is not the case here*, it is not difficult to imagine a Lacey Act defendant in the future, who has the means and connections in a foreign country, lobbying and prevailing upon that country's officials to invalidate a particular law . . . .

Id. at 23a-24a (emphasis added).

ence was due to the official position of the Honduran Embassy, the Eleventh Circuit examined each issue by itself and—drawing heavily on the discredited theories proffered by Ms. Paz—agreed with the prosecution in all respects. *Id.* at 21a-22a & n.25.

b. Judge Fay dissented. Pet. App. 35a-43a. He rejected the notion that Honduras had "'shifted' its position" as "simply not accurate," *id.* at 35a, 42a, and pointed out that the majority had equated the views of lower-level officials with the authoritative interpretation that had since become available:

> There was no one official voice for the government of Honduras [in the district court]. But, there is now. The Honduran courts have ruled and the Honduran Embassy has filed an *amicus* brief advising us of the Honduran government's position . . . . That is the *only* official government position I am aware of in this record.

Id. at 36a (emphasis in original). Judge Fay sharply took issue with the majority's portraying the process by which Honduras arrived at its position as "akin to something sinister"; in fact, Judge Fay stated, the identical process "occurs routinely in our country." *Id.* at 42a.

Judge Fay also pointed out that despite the importance of finality as a general notion, "in the context of an invalidated substantive criminal law which forms the basis of a criminal prosecution or conviction, [the majority's] reliance on the concept of finality is misplaced." Pet. App. 41a. Even if there had been a "change" in the law, Honduran and American law both require that a change in law be applied retroactively to a defendant whose conviction is still pending on appeal, Judge Fay explained. *Id.*

7. Mr. McNab sought rehearing on numerous grounds. The panel granted rehearing in part, solely to delete the parts of its opinion that "deferred" to the prosecution's interpretation of Honduran law. The court made no other changes and refused to reconsider Mr. McNab's conviction notwithstand-

ing the considered views of the Honduran government, which filed an additional brief advising the en banc court of its official position. Judge Fay again dissented. *See* Pet. App. 78a.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's amended opinion cites, as the sole remaining basis for the court's failure to credit the Republic of Honduras's official interpretation of its own laws, a supposed principle of "finality" that is premised on the assumption that foreign governments are uniquely susceptible to "inevitable political changes" or corrupt influences from individuals "with means and connections" (Pet. App. 23a-24a), and that such presumed instability and venality renders the legal interpretations proffered by such governments inherently suspect. This misguided reasoning conflicts with the decisions of this Court, and with the decisions of other federal courts.

First, the Eleventh Circuit is alone among the courts of appeals in refusing to accord deference to the construction of foreign law adopted by the authorized representatives of the foreign state. Several other circuits have considered the question, and they agree that deference ordinarily must be accorded to the foreign nation's interpretation. Second, this Court and other circuits have consistently presumed the propriety and regularity of the official acts of foreign governments. By resting its rule of "non-deference" on its unjustified—and, in this case, concededly unsupported—presumption that foreign governments are especially susceptible to instability or corrupt influences, the Eleventh Circuit directly contravened this principle. Finally, the Eleventh Circuit imposed its "finality" principle before Mr. McNab's conviction had become final. By denying Mr. McNab the benefit of the current law while his direct appeal was still pending, the court reached a result incompatible with this Court's holdings and raised a due process question on which this Court

has granted certiorari in recent years but never squarely resolved.

I. The Decision Below Is Contrary To The Holdings Of This Court And Other Federal Courts On Important And Recurring Issues

Almost two hundred years ago, Chief Justice Marshall observed:

> [N]o Court in the universe, which professed to be governed by principle, would, we presume, undertake to say, that the Courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the Courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction, than to depart from the words of the statute.

Elmendorf v. Taylor, 23 U.S. (10 Wheat.) 152, 159-60 (1825). In this case, the Eleventh Circuit clearly "depart[ed] from th[e] construction" given to Honduran law by Honduran officials undoubtedly empowered to speak authoritatively as to the meaning of their own laws, and from the approach unanimously followed by other courts of appeals. The conflict created by the decision below clearly warrants resolution by this Court.

A. Other Circuits Unanimously Hold That A Foreign State's Interpretation Of Its Own Laws Is Entitled To Deference

Every circuit but the Eleventh that has been faced with an issue of foreign law and has had the benefit of the authoritative views of the nation in question has accorded those views considerable, even conclusive, weight. Indeed, courts of appeals have deferred to the official views of the foreign state even when those official views change in the course of the

litigation or when the foreign country submits a construction that is markedly in the country's own self-interest—neither of which occurred here.

1. In *Riggs National Corp. v. Commissioner* ("*Riggs I*"), 163 F.3d 1363 (D.C. Cir. 1999), the D.C. Circuit considered the deference issue in a context similar to the one presented here—the impact of a foreign government official's interpretation on a U.S. statute that incorporates foreign law—but reached precisely the opposite conclusion. A corporation paying federal tax on foreign-derived income may credit against its tax liability the amount of any foreign taxes it has paid. 26 U.S.C. § 901. Riggs Bank had made a series of loans to the Central Bank of Brazil; the Central Bank not only paid Riggs interest on the debt but also paid Brazil, on Riggs's behalf, the amount of Riggs's tax liability on the interest income. The IRS contended, however, that Riggs could not deduct the Brazilian tax payments, because any interest income that Riggs received from a government entity (*i.e.*, the Central Bank) was not taxable under Brazilian law. The position of the IRS was supported by an opinion from the Supreme Court of Brazil, but was flatly contrary to a private letter ruling by the Brazilian Minister of Finance, who had concluded that taxpayers in Riggs's position *were* obliged by law to pay the tax. 163 F.3d at 1365-66.

Reversing the Tax Court's decision for the IRS, the D.C. Circuit noted first that Brazil is a civil law country that does not follow the rule of *stare decisis*, and thus the Brazilian Supreme Court's opinion in a different case was not controlling. Instead, the court found the ruling by the Finance Minister dispositive. 163 F.3d at 1366. A reexamination of the legal sufficiency of that ruling, the court held, would violate the act of state doctrine, since the reexamination would effectively treat the Minister's actions as "invalid" and "[t]he act of state doctrine requires courts to abstain from even engaging in such an inquiry." *Id.* at 1368. Rejecting the Service's claim that the case involved a mere "interpretation of law"

that was "not the type of act of state contemplated by the doctrine," the court noted that the Minister's order had legal force in Brazil—he had ordered the Central Bank to pay the tax and his decision would bind other, similarly situated taxpayers. *Id.* at 1367-68.

Notably, the D.C. Circuit deferred to the Minister's view even though it *contradicted* not only the views of the Brazilian Supreme Court, but also an earlier ruling by the Brazilian Revenue Service. *See* 163 F.3d at 1366. The Minister, however, was "the highest-ranking Brazilian authority on tax matters," and his ruling on Riggs's obligation to pay was the "definitive" word on the matter. *Id.* That the superior official had countermanded lower-ranking officials' decision did not trouble the D.C. Circuit, which noted that, "*as in the United States*, the revenue service might be persuaded to change its view." *Id.* (emphasis added).

In *Riggs I*, as in this case, the authoritative opinion ultimately offered by the highest-ranking relevant official of the foreign government differed from the opinion initially reached by lower-level officers; in this case, however, the highest-ranking officials' interpretation received *no* deference precisely *because* it differed from the views expressed by Ms. Paz, a lower level functionary who had *no* legal authority to speak to the issue on behalf of Honduras. And, in this case as in *Riggs I*, the rulings and opinions of the responsible officers whose views were rejected by the Eleventh Circuit (the Minister of Agriculture's ruling, the Attorney General's formal opinion, and the Honduran Congress's interpretive decree) indisputably have binding effect within Honduras. *See, e.g.*, Pet. App. 318a (order to Ministry of Agriculture employees). By eschewing the approach followed by the D.C. Circuit, the Eleventh Circuit effectively declared "invalid" those rulings and opinions.

Like the D.C. Circuit, the Ninth Circuit has held that a federal court may not second-guess a foreign state's construction of its own law without implicating the act of state

doctrine. In *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468 (9th Cir. 1992), the court was required to ascertain whether Chinese law blocked a discovery request. Applying principles similar to those of *Riggs I*, the Ninth Circuit gave categorical deference to the Chinese government's view.

In *Richmark*, Beijing Ever Bright Industrial Co. ("Beijing"), a company owned by the People's Republic of China (PRC) and operating as "an arm of the PRC government," defaulted on a claim in a U.S. court and faced demands for discovery to identify its assets for collection purposes. 959 F.2d at 1471-72. Beijing refused to comply with the discovery request (and was held in contempt) after being instructed by the "Ever Bright Group," a government agency that oversaw Beijing's operations, that PRC state-secrecy laws precluded disclosure of most of the information sought. *Id.* at 1472-73. On appeal, the Ninth Circuit accorded categorical deference to the Ever Bright Group's determination of PRC law, holding that it "ha[d] neither the *power* nor the *expertise* to determine for [itself] what PRC law is," and that it could not contradict the PRC's interpretation without implicating the act of state doctrine. *Id.* at 1474 & n.7 (emphasis added). Given the conflict between the U.S. litigation and the foreign law, the court proceeded to balance the national interests involved, as this Court's cases require,[10] and decided that the balance tipped in favor of compelling discovery against Beijing. *Id.* at 1478-79.[11]

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[10] Under this Court's decisions, a court in such a situation examines first whether the foreign law does bar compliance with the discovery order, and then whether any sufficiently weighty countervailing interest justifies compelling discovery nonetheless. *See Société Nationale Industrielle Aerospatiale v. U.S. Dist. Court*, 482 U.S. 522, 544 nn.28-29 (1987).

[11] Notably, the Ninth Circuit has deferred to the views of foreign legal officials even after those officials have ostensibly

2. The Second, Fifth, and Seventh Circuits have also held—citing the considerations that this Court has invoked in deferring to administrative agencies and state executive officials—that federal courts generally must defer to a foreign government's construction of its own laws.

In the leading case in this line, *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279 (7th Cir. 1992) (per curiam), the Seventh Circuit deferred to the French government's interpretation of an aquatic-pollution law. After a catastrophic spill from an oil tanker off its coast, France sued Amoco to recoup pollution damages and the costs of cleanup, including the expense incurred due to oil that washed ashore. *Id.* at 1288-89. The scope of Amoco's potential liability turned on the interpretation of a French statute authorizing the government to incur cleanup costs and seek reimbursement from the vessel owner: Amoco argued that this authority did not extend to costs associated with oil that drifted ashore, while

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changed their *own* interpretations, as opposed to overruling the unauthorized opinion of a subordinate as in this case. In *Kaho v. Ilchert*, 765 F.2d 877 (9th Cir. 1985), two applicants' eligibility for visas turned on whether their sponsor had become their parent through a "customary adoption" in the Kingdom of Tonga. The Tongan Crown Solicitor had submitted a letter that convinced federal courts, and the Board of Immigration Appeals, that Tongan law did not recognize customary adoptions. *E.g.*, *Mila v. Dist. Director*, 678 F.2d 123, 125-26 (10th Cir. 1982); *Matter of Palelei*, 16 I. & N. Dec. 716, 718 (1979). However, the Crown Solicitor subsequently revised his views in a second letter, stating that customary adoptions *do* create a parent-child relationship under Tongan law. *Kaho*, 765 F.2d at 883. Although the BIA refused to change its position in light of the Crown Solicitor's second letter, the Ninth Circuit held that analysis "unsound," because the second letter demonstrated that the Crown Solicitor had "retracted his original conclusion" and the revised position, bolstered by other evidence, correctly stated Tongan law. *Id.* at 884 (disagreeing with *Matter of Fakalata*, 18 I. & N. Dec. 213, 216-17 (1982)).

France contended that the statute permitted it to recover all such costs. *Id.* at 1311-12.

The Seventh Circuit rejected Amoco's contention and accepted France's view, despite the law's ambiguity and the competing testimony by "expert[s] of the highest skill and repute supporting [each side's] interpretation." 954 F.2d at 1312. Despite France's financial interest in the outcome, the court ruled that France's construction of its own law was dispositive:

> If all of the litigants were private parties, we would need to decide whether [the broader] understanding of the law is correct. But the Republic of France appears in this court and assures us that Article 16 applies to oil that reaches shore. . . . *A court of the United States owes substantial deference to the construction France places on its domestic law.*

Id. (emphasis added). The Seventh Circuit explained that federal courts routinely defer both to state or local government officials construing the law of their jurisdictions and to federal administrative agencies construing the statutes and regulations they administer. "Giving the conclusions of a sovereign nation less respect than those of an administrative agency," the court noted, "is unacceptable." *Id.*

The Second Circuit followed a similar approach in *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70 (2d Cir. 2002), *cert. denied*, 123 S. Ct. 2256 (2003), where the court accorded deference to the Indonesian government's construction of that nation's property law—again, despite that government's obvious pecuniary interest in the outcome. Karaha Bodas Co. had obtained judgment on an arbitral award against the defendant oil and gas company ("Pertamina"), which was owned and controlled by the Republic of Indonesia. Seeking to enforce that judgment, Karaha Bodas levied on several trust accounts in New York holding revenues from Pertamina's operations.

Under the Foreign Sovereign Immunities Act and New York law, however, those revenues could be attached only if they were the property of Pertamina and not the Republic of Indonesia. *Id.* at 83. Determining the dispositive question of ownership required resort to Indonesian property law. *Id.* at 88.

The Second Circuit agreed with the construction of Indonesian law advanced by Pertamina and the Indonesian Ministry of Finance, which joined Pertamina's appeal. *Karaha Bodas*, 313 F.3d at 81-82, 92. In rejecting Karaha Bodas's alternative interpretation, the court agreed "with other Courts of Appeals that have suggested that a foreign sovereign's views regarding its own laws merit—although they do not command—some degree of deference." *Id.* at 92 (citing *Amoco Cadiz*, 954 F.2d at 1312, and *Access Telecom, Inc. v. MCI Telecommunications Corp.*, 197 F.3d 694, 714 (5th Cir. 1999)). The court concluded, "Where a choice between two interpretations of ambiguous foreign law rests finely balanced, the support of a foreign sovereign for one interpretation furnishes legitimate assistance in the resolution of interpretive dilemmas." *Id.* The court accordingly adopted Indonesia's preferred construction. *Id.*

The Fifth Circuit has also accepted a view of deference patterned after the Seventh Circuit's analysis. *Access Telecom*, 197 F.3d at 713-14. Considering an antitrust action that required it to ascertain the legality of one party's business under Mexican law, that court held that, "[r]ecognizing the difficulty of interpreting foreign law, courts may defer to foreign government interpretations" of that law. *Id.* at 714 (citing and favorably discussing *Amoco Cadiz*, 954 F.2d at 1312). Relying on that principle, the defendants in *Access Telecom* had sought deference for an "official circular" issued by the Mexican Secretary of Communications and Transportation (SCT). The Fifth Circuit concluded, however, that deference was not appropriate, because neither the Republic of Mexico nor the SCT had appeared "before this

court" and, in any event, there was no showing that the SCT was "empowered to interpret"—not just "to enforce"—Mexican law. *Id.*

Finally, long before cases such as *Amoco Cadiz* and *Riggs I*, the Court of Customs and Patent Appeals—whose decisions bind the Federal Circuit, *see South Corp. v. United States*, 690 F.2d 1368, 1370 (Fed. Cir. 1982) (en banc))—explicitly invoked Chief Justice Marshall's opinion in *Elmendorf* in support of a strong principle of deference. *See United States v. Pillsbury Flour Mills Co.*, 96 F.2d 854, 859-60 (C.C.P.A. 1938). The court in *Pillsbury* found dispositive the construction of Cuban tax law by that nation's (pre-Castro) executive authority, and it expressly rejected a lower court's assertion that, under *Elmendorf*, only *judicial* constructions of foreign law may receive deference. *See id.* at 858-60. Rather, the court wrote, the construction of a foreign country's law by that nation's "high officials" is "not susceptible of correction by [U.S.] courts." *Id.* at 859. The court concluded that "[s]ince the Cuban Government itself has construed its own law . . . as it affects its own internal affairs, that construction should be accepted as to the issue here involved." *Id.* at 860.

B. While The Majority Rule Of Deference Is Supported By This Court's Decisions, The Eleventh Circuit's Rationale Conflicts With Decisions Of This Court And Other Federal Courts

Each of the rationales on which courts adhering to the majority rule have relied—whether based on expert familiarity or on international comity—are soundly rooted in this Court's cases. Indeed, this Court's deference cases, from *Elmendorf* forward, teach that when a federal court lacks expertise in interpreting the law in question, when the court is presented with a construction of the law by an actor or body that is specifically authorized to interpret or implement the law, and when the consequences of the court's rejecting that

construction—such as a negative impact on foreign relations—are particularly severe, the court generally must defer.

1. This Court has repeatedly cautioned federal courts to tread lightly in areas with which their familiarity is limited and in which a government official or agency possesses relevant expertise. *See, e.g.*, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984) (federal agency); *Frisby v. Schultz*, 487 U.S. 474, 483 (1988) (local government officials); *see also Lambert v. Wicklund*, 520 U.S. 292, 301 (1997) (per curiam) (Stevens, J., concurring in the judgment) (construction of Montana law proffered by Montana's attorney general).[12] Certainty, predictability, and consistency in the law are undercut when comparatively inexpert judges impose their own constructions in preference to the interpretation proffered by bodies with much greater expertise. *Amoco Cadiz*, 954 F.3d at 1312-13 (citing *Chevron* and *Frisby*); *accord Richmark*, 959 F.2d at 1474 n.7 (stating that the court lacked "the expertise to determine for [itself] what PRC law is").[13]

Deference is all the more appropriate where the interpretation proffered by a foreign government reflects the law as the

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[12] *Accord Stinson v. United States*, 508 U.S. 36, 44-45 (1993); *see also Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000) ("[W]e must . . . give deference to an [expressive] association's view of what would impair its expression"); *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225-26 (1985) (deferring to judgments of state and local educational institutions).

[13] The case for crediting a foreign government's interpretation is strongest where, as here, Congress has expressly made foreign or State law a distinct element that must be proved; by directly incorporating foreign and state law into federal law, Congress itself presumably intended that courts accord deference to the policymaking expertise and interpretive judgment of States and other nations. *Compare United States v. Mead Corp.*, 533 U.S. 218, 227-29 (2001).

relevant organs of that government have determined that it must be understood and enforced within that country—which almost invariably will be the case where, as here, the foreign country proffers the views of its highest officials through its embassy in the United States. In those circumstances, a federal court's rejection of the proffered construction necessarily and impermissibly "declare[s] invalid the official act of a foreign sovereign performed within its own territory," *W.S. Kirkpatrick & Co. v. Envt'l Tectonics Corp.*, 493 U.S. 400, 405 (1990), as the D.C. Circuit correctly recognized. *Riggs I*, 163 F.3d at 1368; *see also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964). Here, for example, the Eleventh Circuit held that the United States may prosecute a Honduran citizen for violating Honduran law even though that nation could *not* penalize Mr. McNab or any other Honduran citizen for precisely the same conduct. *See* Pet. App. 318a (Minister of Agriculture's direction to all Ministry employees to abide by precisely the same construction of Honduran law that the Eleventh Circuit thought incorrect); *id.* at 268a (Attorney General's opinion).

Notably, the circuits applying the majority rule have found these considerations of expertise and comity sufficiently compelling to outweigh any concern that a foreign state may be biased or self-interested. For example, several circuits have deferred to the legal views of foreign governments even when those governments stand to profit, as did the PRC's subsidiary company in *Richmark*, Indonesia's in *Karaha Bodas*, and France itself in *Amoco Cadiz*. Similarly, in *Riggs I* the D.C. Circuit did not dispute the IRS's view that "the Brazilian government's action" was "particularly vexing" and "opportunistic," or that it amounted to giving Brazil's Central Bank "virtually 'a free lunch'—at the American Treasury's expense." 163 F.3d at 1369. In this case, by contrast, the representation that warrants deference is based solely on Honduras's interests in ensuring that its established

processes for error-correction are respected and in preserving the consistent application of its law to its own citizens.

2. The Eleventh Circuit's refusal to defer to the official views of Honduras not only conflicts with the approach followed by other circuits, but also is based on reasoning that itself conflicts with this Court's and other circuits' cases. Because the Eleventh Circuit abandoned on rehearing its initial (and plainly erroneous) theory of "deference" to the prosecutors, its decision now rests solely on a purported "finality" principle that freezes the law at the trial stage in order to safeguard prosecutions from the instability or corruption of foreign countries. That rationale squarely contradicts this Court's cases.

This Court explained as long ago as 1845 that U.S. courts must presume that the actions of foreign government officials are free from malign influence. In *United States v. King*, 44 U.S. (3 How.) 773 (1845), this Court considered a property transfer whose validity turned on whether a certificate by a colonial surveyor-general acting on behalf of Spain had been procured by fraud. *See id.* at 785. The Court agreed that "it is inconsistent with the comity due to the officers of a foreign government, to impute to them fraud, or connivance in a fraud, in an official act where their conduct has not been questioned by the authority under which they were acting." *Id.* at 785-86. This is particularly true where the foreign sovereign's own interests, or its citizens', are at stake, but even "as regards the interests of others, the acts of the officer, in the line of his duty, will *prima facie* be considered as performed honestly, and in good faith." *Id.* at 786; *cf. Kirkpatrick*, 493 U.S. at 409 ("The Act of State doctrine . . . requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid.").

Other federal courts have consistently applied this presumption of regularity to the actions of foreign officials. In a subsequent appeal in the *Riggs* case, for example, the D.C. Circuit adhered to *King*, holding that the presumption "ap-

plies to the actions and records of foreign public officials" and required the IRS to presume from foreign records, absent evidence to the contrary, that taxes had been paid on Riggs's behalf. *Riggs Nat'l Corp. v. Comm'r* ("*Riggs II*"), 295 F.3d 16, 20-21 (D.C. Cir. 2002); *accord Murarka v. Bachrack Bros.*, 215 F.2d 547, 552-53 (2d Cir. 1954) (Harlan, J.) (presuming, absent contrary proof, the validity of an Indian vice consul's "determination . . . that the plaintiffs were Indian citizens" and citing *King*, 44 U.S. (3 How.) at 784-86); *see also Monaco v. Dulles*, 210 F.2d 760, 763 (2d Cir. 1954) (Italian military authorities).

Although the presumption of regularity may be rebutted by "clear and specific evidence," *Riggs II*, 295 F.3d at 21; *see King*, 44 U.S. (3 How.) at 785-86, there is no basis for rebutting the presumption here. Even if the Eleventh Circuit were correct in positing a "change" in Honduras's official position (and, as Judge Fay explained, it was not, *see* Pet. App. 35a-36a), that would scarcely be irregular or untoward. As both Judge Fay and the D.C. Circuit noted, agencies in this country often, and appropriately, change their legal positions. *Id.* at 42a; *Riggs I*, 163 F.3d at 1366. In fact, this Court has frequently vacated lower-court judgments based on the Solicitor General's conclusion that the litigating position urged by the government below either cannot be defended or must be modified in light of intervening developments. *E.g.*, *Lawrence v. Chater*, 516 U.S. 163, 165-66 (1996) (per curiam).[14]

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[14] *See also, e.g.*, *Brown v. United States*, 123 S. Ct. 1928 (2003) (mem.); *Price v. United States*, 123 S. Ct. 986 (2003) (mem.); *Hohn v. United States*, 537 U.S. 801 (2002) (mem.); *Jackson v. Massanari*, 534 U.S. 801 (2001) (mem.); *Raquel v. Educ. Mgmt. Corp.*, 531 U.S. 952 (2000) (mem.); *Hoover v. United States*, 519 U.S. 1052 (1997) (mem.); *Goffer v. West*, 519 U.S. 1052 (1997) (mem.); *Dep't of the Interior v. South Dakota*, 519 U.S. 919 (1996) (mem.); *Stephens v. Rubin*, 516 U.S. 1037 (1996) (mem.); *Stutson v. United States*, 516 U.S. 193, 195-96 (1996) (per curiam).

Not surprisingly, the Eleventh Circuit admitted that there was no indication *in this case* that anything untoward had motivated the legal conclusions that Honduras's highest authorities had reached. Pet. App. 24a. Rather, the court of appeals relied on a hypothetical danger of instability or corruption to justify imposing a rule of "finality" *in all cases*. That approach cannot be reconciled with *King* or with the decisions of other circuits that have followed *King*.

C. The Foreign Deference Question Is Significant And Arises Frequently In Federal Courts

The U.S. Code is littered with statutes that, like the Lacey Act or the Tax Code provision at issue in *Riggs*, require interpretation of foreign law.[15] In immigration law, for example, foreign law often determines the validity of a marriage, the effectiveness of an adoption, or the legitimacy of a child. *See supra* n.11. Federal rules of procedure also often require resort to foreign law when an international party is involved. *E.g.*, *Volkswagenwerk AG v. Schlunk*, 486 U.S. 694, 704

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[15] *See, e.g.*, Tariff Act of 1930, § 527(a), 19 U.S.C. § 1527(a) (prohibiting the importation of any wild mammal or bird "[i]f the laws or regulations of any country" forbid it); Marine Mammal Protection Act of 1972, § 102(c), 19 U.S.C. § 1372(c) (similar, for marine mammals); National Stolen Property Act, 18 U.S.C. § 2315 (prohibiting importation or transportation of "stolen" goods); *United States v. Schultz*, 333 F.3d 393, 400-01 (2d Cir. 2003) (determining under Egyptian law whether goods were "stolen" for purposes of § 2315); 26 U.S.C. §§ 404A, 841, 901, 907; Age Discrimination in Employment Act of 1967, § 4(f)(1), 29 U.S.C. § 623(f)(1) (no liability if compliance with the ADEA would violate foreign law); *Mahoney v. RFE/RL, Inc.*, 47 F.3d 447 (D.C. Cir. 1995) (applying this provision and holding that failing to adhere to an early retirement age specified in a collective bargaining agreement would violate German law); *see also, e.g.*, 42 U.S.C. § 1705(a); Death on the High Seas Act § 4, 46 U.S.C. app. § 764; 49 U.S.C. §§ 41313, 44102(a).

(1988) (service of process); *Société Internationale pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197, 202, 204 (1958) (foreign discovery-blocking statutes); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) (*forum non conveniens*). And, of course, foreign law may simply provide the rule of decision in a civil action under choice of law principles or resolve an ancillary aspect of such a case. *E.g.*, *Karaha Bodas*, 313 F.3d at 85-86; *Amoco Cadiz*, 954 F.2d at 1310-11. As the reported cases demonstrate, foreign governments frequently express to American courts their official views on questions controlled by the law of their respective countries. Indeed, this Court has frequently received, and apparently accepted, such representations itself. *See JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 98-100 & n.4 (2002); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798-800 (1993). Plenary review by this Court is clearly warranted to resolve the conflict over the appropriate standard of deference to be paid to the foreign nation's views in such cases.

II. The Eleventh Circuit's Holding That Foreign Law Becomes "Final" Before The Conclusion Of Direct Appellate Review Cannot Be Squared With Due Process Protections

Under the Due Process Clause, no conviction is valid unless each and every element of the offense is proven to a jury, beyond a reasonable doubt. *E.g.*, *United States v. Gaudin*, 515 U.S. 506, 510 (1995); *In re Winship*, 397 U.S. 358, 364 (1970). An equally "basic norm[] of constitutional adjudication" is the guarantee that, until the conclusion of direct review—*i.e.*, until the conclusion of certiorari proceedings in this Court, *Clay v. United States*, 123 S. Ct. 1072, 1076 (2003)—a conviction is not yet "final" and must be reexamined in light of any intervening changes in the law. *Griffith v. Kentucky*, 479 U.S. 314, 322, 328 (1987); *see Powell v. Nevada*, 511 U.S. 79, 84 (1994). Indeed, even *after* a conviction becomes "final" under this Court's cases, a

defendant must receive the benefit of any subsequent authoritative interpretation that makes clear that the conduct proven at trial did not, in fact, satisfy the elements of the offense of conviction. *See Bunkley v. Florida*, 123 S. Ct. 2020, 2021, 2023 (2003) (per curiam); *Fiore v. White*, 531 U.S. 225, 228-29 (2001) (per curiam).

Honduras is a civil law country in which the final authority to interpret the laws rests with the Congress, rather than with the courts as in a common law system, and in which the Attorney General is the country's sole "Legal Representative." Pet. App. 257a, 408a, 416a-17a. Thus, the interpretations of the Congress and the Attorney General, which demonstrate that Mr. McNab violated no Honduran law and hence no U.S. law, are equivalent to the state-court decisions refining the elements of the offense that this Court found to warrant relief in *Fiore* and *Bunkley*—even *after* the convictions in those cases had become final. Indeed, even if the Eleventh Circuit were correct in characterizing all the post-trial developments as a "change" in Honduran law, both United States and Honduran law would require that those "changes" be applied in this case, where the criminal conviction is under direct review and thus not "final": under the *Honduran* Constitution, changes in the law that benefit the accused in a criminal prosecution must be given retroactive effect (Pet. App. 415a), and the settled *American* rule is that (even apart from the controlling retroactivity principles derived from *Griffith* and its progeny) changes to penal statutes operate retroactively absent contrary legislative direction, *see, e.g.*, *Yeaton v. United States*, 9 U.S. (5 Cranch) 281, 283 (1809).

Moreover, if there were any merit to the Eleventh Circuit's novel declaration that "finality" forecloses reexamination on *direct* appeal of the correctness of foreign law determinations made by the trial court, this case would clearly present "the issue left open in *Fiore*" and not reached in *Bunkley* due to an ambiguous lower-court decision: whether

due process requires that a new interpretation of a statute of conviction be applied "retroactively," notwithstanding any principle of finality, if the new construction would exonerate the defendant. *Bunkley*, 123 S. Ct. at 2023. That important and unresolved question continues to warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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